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No. 82-1110

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC., et al.,
Petitioners,

VS.

CLIPPER EXXPRESS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

A. The Facts

Respondent Clipper Exxpress ("Clipper") is a freight forwarder subject to regulation by the ICC. It transports commodities from Chicago and points east thereof to the major cities on the west coast. Petitioners are the Rocky Mountain Motor Tariff Bureau and several of its member motor carriers who collectively hold 80% of the trans-continental surface transportation market. [App. A at 2; CT 609]

In the early 1960s, the freight forwarder industry was dying. As an investigation by the ICC showed, the regulated forwarders' plight was attributable to the unregulated competition of nonprofit shipper associations. *Ex Parte No. 266, Investigation Into the Status of Freight Forwarders,* 339 ICC 711, 792-3 (1971). The Commission urged the forwarders to publish lower rates for their customers in order to survive. *Id.* at 796.

Clipper did precisely what the ICC told it to do. To prevent further traffic losses to unregulated competition and to regain traffic previously lost, Clipper published a reduced "Freight-All-Kinds" tariff, Tariff 55. [CT 2138, 2148-50][1] However, Clipper knew from past experience that petitioners had continuously sought to maintain the rates of freight forwarders above those of motor carriers and that petitioners would take coercive action to maintain that historical spread. [CT 2149] Clipper therefore expected petitioners to protest any reduced tariff, regardless of its legality or competitive justification. [CT 2149] Clipper feared that any unwarranted protests could induce the ICC to suspend or investigate Tariff 55 so, initially, Clipper reduced its rates only partially to decrease the likelihood of ICC action; Clipper planned to further reduce its rates if the Commission ignored petitioners' expected protests. [CT 2138-9; 2149-50]

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[1]Because shipper association charges applied to all commodities of their various members, Clipper structured Tariff 55 as a "Freight-All-Kinds" ("FAK") rate also. An "FAK" rate is available to all shippers, regardless of commodity, and permits the shipper to combine various commodities in the same trailer load.

Despite Clipper's efforts to avert that which it feared, petitioners immediately filed a protest against Tariff 55 and thereafter lodged 16 additional protests against supplements to the tariff. Moreover, during the same period, petitioners filed 68 protests against other forwarder publications. [CT 2139] From the beginning, each of the protests against Clipper's tariffs was filled with baseless and fraudulent claims relating to every factor the ICC might have considered material to its decision: petitioners misstated the applicable charges; petitioners understated motor carrier costs; petitioners overstated the forwarders' costs by approximately 40%; petitioners withheld vital cost data from the ICC; petitioners misstated the scope of the tariff and its effect on their traffic; and petitioners repeatedly cited old ICC decisions which they knew had long since been repudiated. [CT 2093, 2102, 2137, 2157] Petitioners' baseless protests caused the ICC to investigate Tariff 55 for over two years, thereby casting a cloud upon the legality of the rate which made it difficult to sell to shippers.

Fraud infected petitioners' very first protest, filed November 30, 1970, wherein they repeatedly misstated that

> "[T]he proposed reduced FAK rate . . . drastically undercuts the rate structure currently maintained *from and to* these principal points *not only by the motor carriers and railroads,* but also by the freight forwarders. . . . The current proposal is so drastic that it clearly constitutes a destructive competitive practice." (emphasis added)

The truth is that Clipper's charges exceeded petitioners' charges by 16% on identical traffic and this truth was

known to petitioners from the beginning.[2] Petitioners also represented to the ICC in their very first protest:

> "The 1968 Continuous Traffic Study (CTS) shows that 152,943,200 pounds of freight, producing $8,835,214 of revenue moved from Chicago to California points via motor carrier. The average revenue per hundredweight from Chicago was $5.78, as compared to the proposed FAK rate of 352 cents per hundredweight."

This was a deliberate misstatement: petitioners took the combined motor carrier average revenue on both less-than-truckload and truckload traffic to produce the $5.78 per hundredweight figure, making it appear that petitioners' truckload charge was 64% above Clipper's truckload charge. Petitioners knew, however, that Clipper's proposed charge of $1056 per 30,000 lb. trailer was 16% above their charge.[3]

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[2] RMMTB 1969 TRUCKLOAD TRAFFIC

	No. of Trailers	RMMTB Charge	Clipper Charge	Percentage by Which Clipper Charge Exceeds RMMTB Charge
Eastbound	5,716	$5,950,871	$ 7,137,033	20%
Westbound ...	3,084	2,850,314	3,312,797	16%
	8,800	$8,801,185	$10,449,830	19%

Neither Clipper nor the ICC knew these figures until the protest dated May 10, 1971 had been filed, six months after the tariff had been placed under investigation. Hence the fraud was successful from the outset. The above was taken directly from the pleadings on file in the ICC, which are a proper subject of this Court's judicial notice.

[3] Thus, even if petitioners did not include misrepresentations about *costs* in the initial protest—as they state in footnote 5 of their petition—there was ample fraud regarding actual and proposed *charges* to trigger an investigation. Thereafter, petitioners compounded their sins by introducing a host of fraudulent misrepre-

In the course of discovery, Clipper learned of petitioners' anticompetitive purpose in prosecuting their fraudulent and frivolous protests against Clipper's rates: petitioners have agreed among themselves not to solicit each other's customers by means of competitive rate offers.[4] Petitioners filed their deliberately false protests against Clipper's tariff to protect their illegal customer allocation/rate-fix scheme.

Once the ICC placed Tariff 55 under investigation, Clipper had no choice but to answer each of petitioners' successive protests over the next three years. [CT 2139; 2150] The ICC found in Clipper's favor at every step of the administrative hearing process. Finally, after petitioners had exhausted all ICC procedures in their effort to obstruct Clipper's rate publications by prolonging the ICC's investigation thereof, Clipper was able to meet the rates of unregulated shippers' associations.

B. Proceedings Below

This case is over ten years old and has yet to come to trial. The complaint was filed in May 1972 and, upon petitioners' motion, was stayed for nearly two years until the

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sentations so as to prolong the ICC's investigation of Clipper for over two years. Those misrepresentations are partially described in Clipper's Reply Brief to the Court of Appeals, pages 2-6.

[4]Although petitioners assumed the existence of the illegal customer allocation/rate-fix conspiracy for purposes of their summary judgment, there was also substantial evidence of the conspiracy. See, e.g., Tyler depo. 105; Sloan depo. 18-19 and Ex. 4; Dunlap depo. Exs. 10, 12; Hale depo. Exs. 20, 21; Adams depo. Exs. 1-3, 1-18; Pellochoud depo. 159 and Ex. 6; Davis depo. 39-40; Flannagan depo. 27; Wright depo. 28. This conspiracy was more fully described at pages 33-6 of Clipper's Opening Brief in the Court of Appeals.

ICC issued a final ruling on the legality of Clipper's tariff. [CT 1, 70] The district judge stayed the case pending the ICC determination because, as petitioners then contended, the agency's decision would constitute evidence of whether the protests were sham and filed solely for purposes of harassment. *Clipper Carloading Co. v. Rocky Mountain Motor Tariff Bureau*, 1972 Trade Cases ¶ 74,229 (N.D. Cal. 1972).

In 1978, shortly before trial was to commence, petitioners moved for summary judgment. [CT 1830] To eliminate the myriad factual disputes between the parties, petitioners directed the district court to make several assumptions. As the Court of Appeals stated, "[N]ot once but three times, [petitioners] represented to the district court that it could assume . . . that they had done exactly what Clipper alleged in its complaint." [App. A at 11] Thus petitioners told the courts below:

> "For purposes of this motion, the court may assume the existence of the conspiracy alleged. . . . It may further assume that everything was done that Clipper says was done to further that conspiracy. Indeed, it may assume that the conduct is both enjoinable and subject to criminal sanctions under the Sherman Act.
>
> "Again, for the purpose of this motion, the court may accept Clipper's allegations as fact and assume that defendants expressly agreed among themselves not to cut rates to divert traffic from one another—or to put it more bluntly, that they agreed that their rates would be exactly the same. . . .
>
> "This court may assume for purposes of this motion that the object behind each of the protests was just what Clipper says it was—that the defendants who filed them were simply trying to eliminate or destroy competition." [CT 1830; App. A at 10-11]

Despite these damning presumptions, the district court granted summary judgment in a two-page order that failed to address most of Clipper's claims. [App. B at 43-4] In a thorough and comprehensive opinion, the Court of Appeals reversed the grant of summary judgment and remanded the case for trial.

REASONS FOR DENYING THE WRIT

Petitioners seek interlocutory review of the Ninth Circuit's unanimous reversal of a summary judgment. The Court below held that protests which (admittedly) contain not only spurious claims but also fraudulent misstatements and which are (admittedly) prosecuted in furtherance of a *per se* violation of the Sherman Act for the purpose (admittedly) of "simply trying to eliminate or destroy competition" are not immune from the antitrust laws under the *Noerr-Pennington* doctrine.[5] The Ninth Circuit's decision was plainly correct, well reasoned and fully in accord with the rulings of this Court and other Courts of Appeal. While petitioners carp at selected passages from the opinion below in an effort to conjure up a conflict among the circuits that could induce the Court to grant certiorari, a review of the present record and the applicable law demonstrates that no conflict exists and the writ should be denied.

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[5] *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). See also, *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

I

CERTIORARI SHOULD BE DENIED BECAUSE RESOLUTION OF THE ISSUES RAISED IN THE PETITION WILL NOT DECIDE THIS CASE

Preliminarily, the Court must recognize that it could not dispose of this litigation by granting the petition and deciding the three questions it raises: when viewed against the opinion below, the very first page of the petition reveals that Clipper's antitrust claim will remain viable irrespective of the outcome of any proceedings in this Court. Clipper submits that it would be a waste of this Court's certiorari power to intervene in this ten-year-old case prior to trial to study legal niceties that are not dispositive of the case.

Clipper has asserted three distinct grounds of antitrust liability [App. A at 4, 11-12] and the Ninth Circuit validated all of them. [App. A at 18, 33-34, 38-39][6] Yet in this Court, petitioners challenge the panel's holdings on only two of the antitrust liability doctrines invoked by Clipper. Accordingly, regardless of how this Court acts on the first two questions raised by the petition, a trial against petitioners on the third basis of antitrust liability approved

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[6]The first of those doctrines holds that sham litigation for the purpose of delaying or obstructing competitive action constitutes a Sherman Act violation. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372 (1974). The second doctrine states that one who commits fraud upon a court or agency for predatory ends may incur antitrust liability. *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965). The third doctrine recognizes that litigation prosecuted in furtherance of an antitrust violation may itself constitute an independent violation. *United States v. Singer Mfg. Co.*, 374 U.S. 174 (1963).

by the Ninth Circuit is certain. See Rule 21.1(a), Rules of the Supreme Court.

Likewise, the Court of Appeals understood—despite petitioners' repeated efforts to mislead it—that Clipper's damages from petitioners' repetitive protests were comprised of three severable parts, only one of which could arguably be precluded by petitioners' strained interpretation of *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922). [App. A at 41] Thus even if this Court were to grant certiorari on the third question presented by the petition, a ruling adverse to Clipper could not end the case; Clipper would be entitled to present the remaining components of its damage study to the jury on remand.

Petitioners ask this Court to review part of this case now and (presumably) they will ask the Court to review the balance later, after trial. Clipper submits that such piecemeal review of a single cause of action is unwise and unnecessary. Following the trial, petitioners may request the Court to review the same issues they present now (and any others that may arise) but with the benefit of concrete findings by the trier of fact and a fully developed record.[7]

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[7]That fully developed record will prove many *other* antitrust violations by petitioners, as pled by Clipper. Petitioners have engaged in a conspiracy to harm Clipper and other freight forwarders through numerous devices. Pursuant to that conspiracy, they:

1. Boycotted forwarders by concertedly terminating scores of "409 contracts" (18 U.S.C. § 409).

2. Protested the publication of numerous other motor carriers' rates to serve forwarders.

3. Delayed and impeded southeast territorial expansion of Clipper's operating authority for approximately ten years.

4. Procured discriminatory sweetheart contracts with west coast ocean carriers.

II

THE COURT OF APPEALS' DECISION ON THE "SHAM EXCEPTION" DOES NOT CREATE ANY CONFLICT

Petitioners ask this Court for an advisory opinion as to whether the "sham exception" to *Noerr-Pennington* immunity may be applied where (a) a single protest or lawsuit is filed or (b) the protest's lack of merit is the only evidence of its "baseless" nature or (c) the protest does not bar a plaintiff's access to the administrative tribunal. While the first issue framed by petitioners poses an interesting hypothetical, it is not an issue presented by the record before this Court. Certiorari should therefore be denied.

A. Single Protest

Petitioners go to great lengths to excite the Court's interest in the question of whether a single baseless lawsuit brought for anticompetitive ends is sufficient to invoke the "sham exception." However, in its present posture, this case does not present the Court with a genuine opportunity to decide that issue. Petitioners' "single protest" argument was neither presented to nor passed upon by the district judge. In the district court, petitioners had conceded that Clipper's action "involves not simply a single protest with respect to one particular rate but an alleged

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5. Allocated customers among themselves, resulting in an illegal rate fix.

All of these practices inflicted substantial harm upon Clipper and are the subject of Clipper's damage claim in the Court below. None remotely involves *Noerr-Pennington*. Nor does *Keogh* bar recovery for the lost traffic, increased operating costs, the expense of defending sham litigation, etc., resulting from petitioners' illegal conspiracy. All of these claims must be tried on remand.

pattern of protests." [CT 484] and invited the court to assume that numerous protests were involved: "This court may assume . . . the object behind each of the *protests* was . . . to eliminate or destroy competition." [App. A at 11; CT 1830]

Petitioners could not do otherwise. The uncontradicted record before the lower court revealed a veritable blizzard of protests in the early 1970s. Against Tariff 55 alone, petitioners prosecuted 17 protests and 13 appeals over several years. Additionally, petitioners protested 68 other forwarder transcontinental tariffs, forcing 50 of them to be withdrawn because the forwarders could not afford to defend every one of them on the merits. [CT 609; 302 at 9-13] Clipper had a vital interest in all of those tariffs. [CT 2139]

In the face of this evidence and the assumption which petitioners invited the lower court to make for the purpose of inducing a dismissal without full development of the record, there is plainly no basis for this Court to accept petitioners' belated contention that only a single sham protest is at issue here. The Ninth Circuit assumed the existence of a single protest solely for the purpose of responding to petitioners' "single protest" theory. [App. A at 18-19] However, the panel recognized the presence of the underlying question of fact when it explained, "[w]hether defendants' protests constitute one or multiple claims is a matter of interpretation" and it specifically declined to reach that issue on appeal from the summary judgment. [App. A at 19, n.19] There simply is no factual predicate within this record for a decision on the "single

protest" issue even if it were otherwise deserving of review.[8]

B. Proof of Baselessness

Petitioners question whether their protests' failure on the merits—standing alone—constitutes sufficient evidence of "baselessness" to preclude summary judgment under *Trucking Unlimited*'s expansion of the "sham exception." Again, that question is not presented by either the record before this court or the opinion below. Contrary to what petitioners would lead the Court to believe, in reversing summary judgment the Ninth Circuit rested its opinion on far more "objective evidence" of "baselessness" than each protest's lack of success. Indeed, petitioners invited the Court to assume the "baseless" nature of their protests and further asked the court to assume "the object behind each of the protests was . . . [petitioners] were simply trying to eliminate or destroy competition." [App. A at 10-11; CT 1830] Hence the Ninth Circuit properly ruled:

> "[D]efendants' intent, admitted for the purpose of their motion, was not to induce favorable administrative action from the ICC, but rather saddle Clipper with such onerous regulatory and administrative burdens that it would be forced to withdraw the rates." [App. A at 17]
>
> "The defendants admitted *arguendo* that their protests were filed automatically and without regard to

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[8] In *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977), Justice Stevens (on behalf of four justices) unequivocally declared that a "single use of the adjudicatory process" was enough to create a cause of action under the sham exception. 433 U.S. at 661-2. Three other members of the Court suggested their concurrence on this point. 433 U.S. at 635-6, n.6. See also, *MCI Communications Corp. v. American Tel. & Tel. Co.*, 1982-3 Trade Cases ¶ 65,137 at p. 71,409 (7th Cir. 1983).

> merit. This establishes that defendants' protests were baseless for the purposes of the motion [for summary judgment]." [App. A at 23]

Accord, *Trucking Unlimited, supra,* 404 U.S. at 511-12; *Landmarks Holding Corp. v. Bermant,* 664 F.2d 891, 896 (2nd Cir. 1981); *City of Gainesville v. Florida Power & Light Co.,* 488 F.Supp. 1258, 1265-6 (S.D.Fla. 1980).

Moreover, Clipper introduced the affidavits of former ICC Commissioners Webb and Hardin detailing petitioners' numerous misstatements of fact and frequent citation of discredited authorities and the affidavits of Messrs. Chambers, McKean and Day to further document the sham, baseless nature of petitioners' protests. [CT 2093, 2102, 2137, 2157][9] Plainly, between petitioners' judicial admissions and Clipper's sworn submissions, the court below had ample cause to find there was a genuine dispute of fact on the question of "baselessness" sufficient to preclude summary judgment.

C. Access Denial

Finally, in asserting that "access denial" is an essential element of the sham exception, petitioners seize upon one clause from the Court's opinion in *Trucking Unlimited* and out-of-context passages from lower court decisions which have followed *Trucking Unlimited* in an effort to create a conflict where none exists. As a reading of *Noerr* reveals, the hallmark of the sham exception is not "access

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[9]Former Chairman of the ICC, Charles Webb, testified: "I have personally examined each of the protests filed by RMMTB . . . In my opinion, the protests were lacking in candor and fairness." He elaborated, "I can only conclude that the misrepresentations were deliberate and filed for the purpose of misleading the Commission's Board of Suspension." [CT 2105-6]

denial." Rather it is conduct which, though ostensibly directed toward influencing government action, "is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Noerr, supra,* 365 U.S. at 144. Although *Trucking Unlimited* exemplified how administrative protests could be employed to "interfere directly with the business relationships of a competitor" by denying access to the agency, "denial of access" is not the sole means of accomplishing such direct, illegal interference.[10]

It makes no sense to speak of a "denial of access" requirement in a case such as this where—unlike *Trucking Unlimited* and the other cases cited by petitioners—access (for the purpose of acquiring prior administrative/judicial approval of competitive activity) is neither required nor desired. Clipper did not need access to the ICC; as provided by statute, Clipper merely had to publish its tariffs and they would have become effective automatically absent petitioners' sham protests. App. A at 3; 49 U.S.C. § 1005; *Bison Steamship Co. v. United States,* 182 F.Supp. 63 (N.D. Ohio 1960). Petitioners' baseless protests were designed to delay Clipper's competitive efforts in the marketplace and they did so for over two years.

Since *Trucking Unlimited,* this Court has declared on several occasions that baseless court or agency litigation

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[10]Although such proof is not a prerequisite to the sham exception, Clipper was denied free and unlimited access to the ICC's regulatory tariff procedures. To the extent petitioners' concealed fraud corrupted the agency processes, "fair and effective access" to those processes was barred in a very real sense. See *City of Mishawaka v. American Electric Power Co.,* 616 F.2d 976, 982-3 (7th Cir. 1980), cert. den., 450 U.S. 960 (1981); *Israel v. Baxter Laboratories,* 466 F.2d 272, 278 (D.C. Cir. 1972). See discussion of petitioners' fraud on the ICC at pages 3-4, *supra.*

prosecuted—as it was here—for the purpose of *delaying* lawful competitive activity may violate the Sherman Act. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372 (1974); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 405 (1978); *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 110 n.15 (1978). In all of these post-*Trucking Unlimited* cases, the victims of the abuse of the judicial/administrative process were not complaining of "access denial." Indeed, they wanted to avoid "access" to the court/agency but the sham claims precluded the victims from extricating themselves from expensive, time-consuming litigation. This Court did not require proof of "access denial" in any of those cases and the Court of Appeals correctly did not require such proof here. [App. A at 24][11]

There is no conflict among the circuits on the issue of "access denial." In cases where the antitrust plaintiff needed prior access to obtain prior approval from a regulatory body—as in *Trucking Unlimited*—the courts have followed that precedent and required some showing of "access denial." See, e.g., *Mark Aero, Inc. v. Trans World Airlines, Inc.*, 580 F.2d 288 (10th Cir. 1978); *Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd.*, 542 F.2d 1076 (9th Cir. 1976), *cert. den.*, 430 U.S. 940 (1977). However, in cases where the antitrust plaintiff did not need prior access to obtain prior approval from a regulatory body—as in *Otter Tail, City of Lafayette* and here—the courts have not demanded proof of "access denial" but have been satisfied by proof that sham protests were designed to

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[11]The leading commentators agree that proof of "access denial" is unnecessary. See P. Areeda and D. Turner, *Antitrust Law* ¶ 203b at 41 (1978); R. Bork, *The Antitrust Paradox* at 354 (1978).

delay competitive activity. See, e.g., *Landmarks Holding Corp. v. Bermant*, 664 F.2d 891, 896-7 (2nd Cir. 1981); *Ernest W. Hahn, Inc. v. Codding*, 615 F.2d 830, 841 (9th Cir. 1980). Accordingly, there is no reason to grant certiorari on the first question presented by the petition.

III

THE COURT SHOULD NOT GRANT CERTIORARI TO REVIEW PETITIONERS' FRAUD UPON THE ICC

In the courts below, Clipper introduced substantial evidence of petitioners' fraud upon the ICC. Petitioners do not and cannot deny that fraud. Instead, they merely contend it is protected by the first amendment.

On their motion for summary judgment in the district court, petitioners assumed and the record showed that petitioners' ICC protests were rife with deliberate misrepresentations. [App. A at 31] The record and the admissions also revealed petitioners' motive for misleading the ICC: petitioners sought to induce the Commission to suspend or investigate Tariff 55, a lower rate which threatened the stability of petitioners' customer allocation/rate-fixing scheme. Contrary to what petitioners would lead the Court to believe, their fraudulent tactics *were* successful and caused the ICC to investigate Tariff 55 for over two years, thereby injuring Clipper's ability to compete.[13] Peti-

[13]Clipper is at a loss to understand how petitioners can represent to this Court that the ICC disregarded their fraudulent protests and was not deceived by them. Petitioners filed numerous protests against Clipper's tariffs praying for suspension or investigation of the rates. In reliance upon petitioners' false claims, the Commission provided the relief sought. That the investigation ultimately terminated in Clipper's favor did not ameliorate the substantial harm caused by its pendency. See *Otter Tail, supra*, 410 U.S. at 381.

tioners now ask this Court to grant certiorari to consider whether their first amendment "right" to perpetrate fraud upon a federal agency for anticompetitive purposes has been infringed by the Ninth Circuit.

Applying the teachings of *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), the Court below held that fraudulent protests—like any other predatory act—"can be the basis of antitrust liability, if . . . the other elements of an antitrust claim are proven." [App. A at 30] That decision did nothing more than overrule petitioners' claim of *Noerr-Pennington* immunity "for furnishing with predatory intent false information to an administrative or adjudicatory body" [App. A at 31]; to prove an antitrust violation, however, Clipper must still prove the fraudulent protests were the means used to unreasonably restrain trade. [App. A at 30, 31]

In requesting this Court to grant certiorari on the second question they present, petitioners do not claim the opinion below conflicts with an opinion of any other circuit. Indeed, the research of the panel and respondent reveals that several other antitrust courts—including this Court—have also condemned the submission of fraudulent information to administrative tribunals and withheld *Noerr-Pennington* immunity for such conduct. *Trucking Unlimited, supra*, 404 U.S. at 513; *Israel v. Baxter Laboratories*, 466 F.2d 272, 278 (D.C. Cir. 1972); *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1296-7 (5th Cir. 1971), *cert. den.*, 404 U.S. 1047 (1972).[13]

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[13]The commentators agree. See, R. Bork, *The Antitrust Paradox* at 358-9 (1978) ("Access to judicial and administrative processes may be a constitutional right, but there is no constitutional right

Instead, petitioners simply argue the decision below is "bad law" and "wrongheaded."

The Court's decision in *Walker Process* was sound and the Ninth Circuit's application of the *Walker Process* doctrine to federal agencies other than the Patent Office was proper.[14] In *Walker Process, supra,* 382 U.S. at 177, defendant allegedly obtained a patent "by knowingly and willfully misrepresenting facts to the Patent Office." This Court held that proof of fraud "would be sufficient to strip [defendant] of its exemption from the antitrust laws." Likewise, proof of petitioners' fraud upon the ICC should strip them of the *Noerr-Pennington* immunity accorded genuine efforts to petition administrative tribunals.

The ICC's position in considering a protest is identical to that of the Patent Office in considering a patent application and the same antitrust strictures should therefore be applied Neither agency has sufficient manpower to scrutinize the constant flow of filings and both therefore rely heavily upon the veracity of the parties appearing before them. [App. A at 33, CT 2108-9] Compare *Beckman Instruments Mfg. Co. v. Chemtronics, Inc.,* 439 F.2d 1369, 1378 (5th Cir. 1970) with *Middle Atlantic Conference Agreement,* 283 ICC 683, 689 (1951) and *Rate Bureau Investigation,* 351 ICC 811, 817 (1975), *aff'd, Motor Carriers*

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to make deliberate misrepresentations to such tribunals or to press baseless claims for the ulterior purpose of wreaking economic injury upon a competitor."); P. Areeda and D. Turner, *Antitrust Law* ¶ 204 at 48 ("There certainly is no privilege for misrepresentation to administrative agencies which base their decisions on information provided by the parties."); Note, 86 Harvard L.Rev. 715, 724 (1973).

[14] *Walker Process* "is not a mere patent decision but an antitrust precedent of general applicability." R. Bork, *The Antitrust Paradox* at 353 (1978). See also *Trucking Unlimited, supra,* 404 U.S. at 513.

Traffic Assoc., Inc. v. United States, 559 F.2d 1251 (4th Cir. 1977), *cert. den.*, 435 U.S. 1006 (1978). Indeed, in the Court below, the ICC appeared as *amicus curiae* and (with Clipper) urged the panel to apply the *Walker Process* doctrine so as to vitiate petitioners' claim of *Noerr-Pennington* immunity for their fraudulent submissions to the Commission. [Brief of ICC at 8-13][15]

Petitioners ask this Court to immunize their fraud upon the ICC because—according to petitioners—it occurred in a "legislative-type proceeding." However, as the Commission itself advised the Court, "The forum here was adjudicatory, not political." *Id.* at 19. The rate protests at issue here were quasi-judicial: formal pleadings were filed; set rules of procedure and evidence were controlling; the Interstate Commerce Act and precedents constituting it were applied; and the decisions of the administrative law judge were subject to appellate review. The ICC's Code of Ethics required absolute truthfulness from the advocates, most of whom were attorneys. Hence the warning of *Trucking Unlimited* was apropos: "Misrepresentations, condoned in the political arena are not immunized when used in the adjudicative process." 404 U.S. at 513.[16]

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[15]The Commission feared that "[a] ruling favorable to defendants could undermine the integrity of the Commission's adjudicatory functions, The National Transportation Policy and the regulatory scheme of surface transportation, by sanctioning and, therefore, encouraging deliberate misrepresentation of fact by rate bureaus and other parties to Commission proceedings. . . ." [ICC Brief at 5-6]

[16]*Arizona Grocery Co. v. Atchison T. & S.F. Ry.*, 284 U.S. 370 (1932) and *Great Northern Ry. v. Merchants Elevator Co.*, 259 U.S. 285 (1922) did not hold the disposition of protests was purely a "legislative" process; both cases recognized the ICC plays a dual adjudicative and legislative role in ruling upon contested rates. 284 U.S. at 388-9; 259 U.S. at 291.

Petitioners' fraud upon the ICC was indistinguishable from the fraud upon the Patent Office condemned in *Walker Process*. In refusing to license the practice of fraud upon the ICC, the opinion below correctly followed the decisions of this Court and other circuits. Certiorari should therefore not be granted on petitioners' second question.

IV

THE KEOGH "ISSUE" IS NOT WORTHY OF REVIEW

With the parties in sharp disagreement over the factual bases for Clipper's damage calculations, the Court of Appeals refused to precipitously strike them prior to trial.[17] Although they have yet to examine Clipper's damage expert either in trial or at deposition—and therefore have no factual record to support their argument—petitioners contend Clipper's damage claim is speculative and contrary to *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922). The third issue raised by the petition regarding the Ninth Circuit's application of *Keogh* in this case is not only premature, but also insignificant.[18]

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[17]Petitioners have repeatedly mischaracterized Clipper's damage study as resting entirely upon assumptions as to action the ICC would have taken absent their sham protests. However, Clipper's damage expert submitted an affidavit flatly contradicting petitioners' unsupported interpretation. [CT 2157] Inexplicably, the district judge ignored the factual dispute, accepted petitioners' representations and granted summary judgment. [App. B at 44] Understandably, the Court of Appeals reversed.

[18]Indeed, it is questionable whether *Keogh* is good law since *Carnation Co. v. Pacific Westbound Conference*, 336 F.2d 650 (9th Cir. 1964) was reversed by this Court, *Carnation Co. v.*

First, as the opinion clearly states, *Keogh* involved only the "legal rights of a *shipper as against carrier* in respect to a rate." 260 U.S. at 163. The other cases cited by petitioners also involved disputes between regulated industries and their customers. See *Arkansas Louisiana Gas Co. v. Hall*, 101 S.Ct. 2925, 2928 (1981); *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 453 (1945); *City of Newark v. Delmarva Power & Light Co.*, 467 F.Supp. 763, 765 (D. Del. 1979). However, like the Court below, several courts have consistently held *Keogh* inapplicable to cases where—as here—the regulated antitrust defendant has manipulated rates in such a way as to damage its competitors. *City of Kirkwood v. Union Electric Co.*, 671 F.2d 1173, 1178-9 (8th Cir. 1982); *City of Groton v. Connecticut Power & Light Co.*, 662 F.2d 921, 929 (2d Cir. 1981); *Essential Communications Systems, Inc. v. Am. Tel. & Tel. Co.*, 610 F.2d 1114, 1121 (3d Cir. 1979); *Marnell v. United Parcel Service of America, Inc.*, 260 F.Supp. 391, 406 (N.D. Cal. 1966). With respect to the application of *Keogh*, other Circuits are in accord with the decision below rather than in conflict.

Second, the Court below understood what petitioners stubbornly refuse to acknowledge, i.e., that "*Keogh* is not even arguably applicable as a bar to" two components of Clipper's damage claim. [App. A at 41] Surely one may

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Pacific Westbound Conference, 383 U.S. 213 (1966). Just as in *Keogh*, *Carnation* involved a shipper claiming antitrust damages measured by the difference between earlier, lower rates and later, higher rates set by defendants' illegal agreement. Compare *Keogh*, 260 U.S. at 160 with *Carnation*, 336 F.2d at 653. The Ninth Circuit applied *Keogh* to bar Carnation's damage claim. 336 F.2d at 662. This Court reversed, recognizing the shipper had a valid antitrust damage claim measured by the rate differential. 383 U.S. at 219 n.3 and 223-4.

seek damages for expenses incurred in defending against sham litigation. *Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 997 (9th Cir. 1979) *cert. den.* 444 U.S. 1025 (1980); *City of Mishawaka v. American Electric Power Co., Inc.*, 616 F.2d 976, 989-90 (7th Cir. 1980). Similarly, any business lost due to the "cloud" of uncertainty surrounding Clipper's tariffs caused by the investigation fraudulently induced by petitioners would be recoverable without making any assumptions about ICC action. [CT 2140][19] Clipper submits it would not be worthwhile for this Court to review only one portion of the damage study before trial or, indeed, before its completion by Clipper's damage expert.

Finally, since *Keogh*, this Court has repeatedly held that antitrust plaintiffs may utilize reasonable assumptions in calculating damages and that any risk of uncertainty befalls the wrongdoer. *Eastman Kodak Co. v. Southern Photo Materials, Inc.*, 273 U.S. 359, 378-9 (1927); *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 562-5 (1931); *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264-5 (1945); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969); *Simpson v. Union Oil Co.*, 396 U.S. 13, 16 (1969). There is no reason why this firmly established rule should be suspended for defendants who abuse the processes of a federal agency and who thereby necessitate assumptions as to what the agency would have done but for such abuse. *In re Multidistrict Litigation Involving Frost Patent*, 398 F.Supp. 1353, 1369 (D. Del. 1975).

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[19]Moreover, all of the damages resulting from the conduct described in fn. 7, *supra*—including Clipper's claims for petitioners' boycott, harassing protests, market exclusion, discriminatory contracts, customer allocation, etc.—do not remotely involve *Keogh*.

Petitioners' interpretation of *Keogh* is erroneous, not the decision below. Accordingly, certiorari on the petition's third question should be denied.

CONCLUSION

With respect to the issues they raise, petitioners are requesting advisory opinions on hypothetical facts not before the Court: this case involves more than a single protest; there is ample evidence of the protests' baseless, fraudulent nature; the ICC did not disregard petitioners' protests but instead provided the relief sought; the multi-faceted damage claim does not rest upon speculative assumptions about action the ICC would have taken absent petitioners' antitrust violations. For this and all of the other reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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